

December 2003

MJI Publications Updates

Adoption Proceedings Benchbook

**Criminal Procedure Monograph 6--
Pretrial Motions (Revised Edition)**

Domestic Violence Benchbook (2d ed)

**Managing a Trial Under The Controlled
Substances Act**

Sexual Assault Benchbook

**Traffic Benchbook--Revised Edition,
Volume 1**

Update: Adoption Proceedings Benchbook

CHAPTER 3

Identifying the Father

3.8 The Paternity Act

B. A Child That the “Court Has Determined to Be a Child Born or Conceived During a Marriage but Not the Issue of That Marriage”

Insert the following text on page 100, immediately after the October 2003 update regarding *Kaiser v Schreiber*, ___ Mich App ___ (2003):

On October 30, 2003, the Michigan Supreme Court reversed the Court of Appeals decision in *Kaiser v Schreiber*, ___ Mich App ___ (2003), and reinstated the judgment of the Kent Circuit Court. *Kaiser v Schreiber*, ___ Mich ___ (2003). The Court stated:

“Plaintiff did not have standing under the Child Custody Act, MCL 722.21 *et seq.*, and would not have standing under the Paternity Act, MCL 722.711 *et seq.*, to seek custody of and visitation rights with a child whose mother was married at the time of the child’s conception and birth. MCL 722.26c; MCL 722.711(a); *Girard v Wagenmaker*, 437 Mich 231 (1991). Under the circumstances of this case, summary disposition was properly granted by the Kent Circuit Court to defendant.” *Id.*

December 2003

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.12 Motion to Dismiss for Delay in Arrest Resulting in Prejudice to Defendant

Insert the following language at the end of the first paragraph on page 14:

See also *People v Musser*, ___ Mich App ___, ___ (2003) (defendant could not show actual and substantial prejudice where a defense witness' testimony in support of the defendant never wavered, even though the record showed that the witness "was exposed to intense cross-examination regarding his memory of the events" that occurred 13 months before defendant's arrest).

6.15 Motion for Compulsory Process of a Defense Witness or Appointment of an Expert Witness at Public Expense

Insert the following language after the second full paragraph on page 23:

In *People v Tanner*, ___ Mich ___, ___ (2003), the Michigan Supreme Court reversed the holding of the Court of Appeals in *People v Tanner*, 255 Mich App 369 (2003). The Court found that because the prosecutor's DNA evidence offered at trial was entirely exculpatory, the defendant could not show that she could not safely proceed to trial without a DNA expert. *Id.* at _____. In regards to the serology evidence that was offered at trial, the Court noted that the prosecution's expert witness testified that "possibly millions" of people shared the same blood profile as in the sample found at the scene. The Court held that the defendant did not show that an expert serologist would offer testimony that would "likely benefit the defense." *Id.* at _____. Therefore, the Michigan Supreme Court reversed the holding of the Court of Appeals and remanded to the trial court for reinstatement of the defendant's felony-murder conviction. *Id.* at _____.

6.24 Motion to Dismiss Because of Double Jeopardy— Multiple Punishments for the Same Offense

Insert the following language near the bottom of page 56 before the last full paragraph:

In *People v Calloway*, ___ Mich ___, ___ (2003), the Michigan Supreme Court held that a defendant's convictions for felony-firearm and felon-in-possession do not violate federal or state prohibitions against double jeopardy. With the exception of the four felonies enumerated in the felony-firearm statute, the Legislature clearly intended that an additional felony charge and penalty may be imposed against a person who possesses a firearm during the commission of a felony.

Update: Domestic Violence Benchbook (2d ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.5 Business Records of Medical or Police Personnel

A. Records of a Regularly Conducted Activity – MRE 803(6)

On page 151, insert the following case summary before the case summary of *Solomon v Shuell*, 435 Mich 104 (1990):

♦ *People v McDaniel*, ___ Mich ___ (2003):

The defendant was convicted of selling a packet of heroin to an undercover police officer. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. At trial, the chemist did not testify because he had retired. However, the trial court admitted the lab report into evidence. On appeal, the defendant argued that the lab report was inadmissible hearsay and could not have been admitted under MRE 803(6). The Michigan Supreme Court indicated that the hearsay exception in MRE 803(6) is based on the inherent trustworthiness of business records, and that that trustworthiness is undermined when records are prepared in anticipation of litigation. The Court concluded that “the police laboratory report is inadmissible hearsay because ‘the source of information or the method or circumstances of preparation indicate lack of trustworthiness.’” *Id.* at ___.

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.5 Business Records of Medical or Police Personnel

B. Public Records and Reports – MRE 803(8)

On page 155, insert the following case summary after the case summary of *People v Stacy*, 193 Mich App 19 (1992):

♦ *People v McDaniel*, ___ Mich ___ (2003):

The defendant was convicted of selling a packet of heroin to an undercover police officer. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. At trial, the chemist did not testify because he had retired. However, the trial court admitted the lab report into evidence under MRE 803(8). The Court of Appeals upheld the admission and in doing so relied upon *People v Stacy*, 193 Mich App 19 (1992). The Michigan Supreme Court reversed the Court of Appeals and stated:

“[T]he *Stacy* Court held that the exclusion of hearsay observations by police officers was intended to apply only to observations made at the scene of the crime or while investigating a crime. The import of that holding is that MRE 803(8) allows admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant. We do not deal with such a situation here. The report at issue, prepared by a police officer, was adversarial. It was destined to establish the identity of the substance—an element of the crime for which defendant was charged Thus, the Court of Appeals erred in applying *Stacy*. Because the report helped establish an element of the crime by use of hearsay observations made by police officers investigating the crime, the report cannot be admitted under MRE 803(8). Further, the error cannot be harmless because this was the only evidence that established an element of the crime for which defendant was charged.” [Internal citations omitted.] *Id.* at ___.

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 15

Sentencing

15.7 Conditional Sentences Under §7411

C. Procedural Requirements for §7411 Sentences

Insert the following bulleted information in the middle of page 347 immediately before the beginning of subsection (D):

- If a defendant is discharged from probation and the charges against the defendant are dismissed under §7411, there is no adjudication of guilt, and the defendant's probationary period cannot be used "for purposes of disqualifications or disabilities imposed by law upon conviction of a crime" MCL 333.7411(1).

A defendant's former §7411 status is not a "felony conviction" and may not be used to deny an individual's application for a concealed pistol permit. *Carr v Midland County Concealed Weapons Licensing Board*, ___ Mich App ___, ___ (2003). When an individual successfully completes a probationary period imposed under §7411, the statutory provisions clearly explain that "a nonpublic record of an arrest and discharge or dismissal under [MCL 333.7411]" may be furnished only to one or both of the entities listed in the statute and only subject to conditions imposed by the statute for the purposes prescribed by the statute. MCL 333.7411(2). According to the Court,

"[T]he Legislature was very clear that the only purpose for which a case dismissed under §7411 may be used to establish a disqualification or disability imposed by law upon conviction of a crime is to preclude employment by the department of corrections or by a law enforcement agency. [A] proceeding dismissed under that section following the successful fulfillment of the terms and conditions of probation may not [be] used to establish a disqualification or disability under the [concealed pistol licensing act] to obtain a concealed pistol license." *Carr, supra* at ___.

Update: Sexual Assault Benchbook

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

G. Business Records of Medical and Police Personnel

1. Records of a Regularly Conducted Activity—MRE 803(6)

On page 353, insert the following case summary before the case summary of *Solomon v Shuell*, 435 Mich 104 (1990):

♦ *People v McDaniel*, ___ Mich ___ (2003):

The defendant was convicted of selling a packet of heroin to an undercover police officer. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. At trial, the chemist did not testify because he had retired. However, the trial court admitted the lab report into evidence. On appeal, the defendant argued that the lab report was inadmissible hearsay and could not have been admitted under MRE 803(6). The Michigan Supreme Court indicated that the hearsay exception in MRE 803(6) is based on the inherent trustworthiness of business records, and that that trustworthiness is undermined when records are prepared in anticipation of litigation. The Court concluded that “the police laboratory report is inadmissible hearsay because ‘the source of information or the method or circumstances of preparation indicate lack of trustworthiness.’” *Id.* at ___.

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

G. Business Records of Medical and Police Personnel

2. Public Records and Reports—MRE 803(8)

On page 356, insert the following case summary before the last paragraph in subsection (G):

♦ *People v McDaniel*, ___ Mich ___ (2003):

The defendant was convicted of selling a packet of heroin to an undercover police officer. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. At trial, the chemist did not testify because he had retired. However, the trial court admitted the lab report into evidence under MRE 803(8). The Court of Appeals upheld the admission and in doing so relied upon *People v Stacy*, 193 Mich App 19 (1992). The Michigan Supreme Court reversed the Court of Appeals and stated:

“[T]he *Stacy* Court held that the exclusion of hearsay observations by police officers was intended to apply only to observations made at the scene of the crime or while investigating a crime. The import of that holding is that MRE 803(8) allows admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant. We do not deal with such a situation here. The report at issue, prepared by a police officer, was adversarial. It was destined to establish the identity of the substance—an element of the crime for which defendant was charged Thus, the Court of Appeals erred in applying *Stacy*. Because the report helped establish an element of the crime by use of hearsay observations made by police officers investigating the crime, the report cannot be admitted under MRE 803(8). Further, the error cannot be harmless because this was the only evidence that established an element of the crime for which defendant was charged.” [Internal citations omitted.] *Id.* at ___.

CHAPTER 8

Scientific Evidence

8.6 DNA Testing and Admissibility

K. An Indigent Defendant's Right to Appointment of DNA Expert Witness

Insert the following text at the end of subsection 8.6(K) on page 432, after the update from March 2003:

In *People v Tanner*, ___ Mich ___, ___ (2003), the Michigan Supreme Court reversed the holding of the Court of Appeals in *People v Tanner*, 255 Mich App 369 (2003). The Court found that because the prosecutor's DNA evidence offered at trial was entirely exculpatory, the defendant could not show that she could not safely proceed to trial without a DNA expert. *Id.* at _____. In regards to the serology evidence that was offered at trial, the Court noted that the prosecution's expert witness testified that "possibly millions" of people shared the same blood profile as the sample found on the bar sink. The Court held that the defendant did not show that an expert serologist would offer testimony that would "likely benefit the defense." *Id.* at _____. Therefore, the Michigan Supreme Court reversed the holding of the Court of Appeals and remanded to the trial court for reinstatement of the defendant's felony-murder conviction. *Id.* at _____.

Update: Traffic Benchbook— Revised Edition, Volume 1

CHAPTER 2

Civil Infractions

2.4 Parking, Stopping, or Standing

D. Disabled Person Parking

Insert the following case summary after the first paragraph of subsection (D) near the middle of page 2-11:

The “courtesy” to which a disabled person is entitled under MCL 257.675(6) extends to relief from liability for any parking violations other than those violations contained in the motor vehicle code or where the vehicle code expressly excepts certain local parking prohibitions regarding traffic and emergency vehicles. *City of Monroe v Jones*, ___ Mich App ___, ___ (2003).

In *City of Monroe*, the Court of Appeals reversed the trial court’s ruling that the defendant was liable for fines and costs associated with parking tickets she received for exceeding the posted time limit for parking spaces near the defendant’s place of employment. The Court stated:

“The language of §675(6) clearly and unambiguously provides, in an all-encompassing manner, that a disabled person shall be relieved of liability for a parking violation except as provided in the statute. There is no dispute that defendant is a disabled person, that her vehicle properly displayed the requisite identification showing her to be disabled, and that she was cited for multiple parking violations.

* * *

“We find that MCL 257.675(6) precludes defendant from being held liable because she is a disabled person and was cited, not for violating the Vehicle Code, but for violating a local time-restriction parking ordinance not contemplated by MCL

257.675(6) as constituting an exception to the liability exemption for disabled persons.” *City of Monroe, supra* at ____.